Supreme Court, U.S.
FILED
OCT 2 1987
JOSEPH F. SPANIOL, JR.
CLERK

No. 87-249

In the Supreme Court of the United States

OCTOBER TERM, 1987

ANDREW A. HANDY, PETITIONER

v.

NATIONAL SECURITY AGENCY, ET AL.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FOURTH CIRCUIT

MEMORANDUM FOR THE RESPONDENTS IN OPPOSITION

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Petitioner contends that respondents—the National Security Agency (the NSA) and its officers—denied him a promotion on the basis of his race, in violation of Title VII of the Civil Rights Act of 1964, 42 U.S.C. 2000e *et seq.*

1. The NSA is the intelligence component of the Department of Defense (Pet. App. 12a). From October 1975 to April 1983, the NSA had a defined Agency Promotion System (*id.* at 13a). Under this system, employees were eligible for promotion to Grade 13 if they had served one year in Grade 12, and either were certified in a professional career area or their promotion was nonetheless found to be "for the good of the Service" (*id.* at 13a-14a). Those employees who were eligible for promotion to Grade 13 were reviewed quarterly under the evaluation criteria established by the defined Agency Promotion System (*id.* at 14a; see also *id.* at 14a-22a).

Petitioner, a black male, was hired by the NSA in 1965 and assigned as a Grade 7 to the agency's Fort Meade, Maryland headquarters (Pet. App. 22a). In 1970, he

received a law degree from the University of Maryland (*id.* at 23a); in 1972, he was professionally certified as a Personnel Officer (*id.* at 22a); and, in 1974, he was promoted to Grade 12 (*ibid.*). Although petitioner was evaluated on a quarterly basis thereafter, he was not promoted to Grade 13 until April 1983 (*id.* at 31a).

2. Beginning in 1980, petitioner filed a series of administrative complaints concerning the NSA's failure to promote him to Grade 13 (Pet. App. 23a-24a). These administrative complaints were denied for a variety of procedural and substantive reasons (*id.* at 24a). Petitioner then filed suit against the NSA and its officials, alleging that the NSA had failed to promote him to a Grade 13 position prior to April 1983 because of his race and in retaliation for his equal employment opportunity complaints (*id.* at 29a, 31a).

At a trial held with respect to his claims of disparate treatment,[1] petitioner did not introduce any direct evidence showing that his supervisors were motivated by any discriminatory animus or that his promotion was delayed due to his EEO claims (Pet. App. 33a-34a). Rather, petitioner attempted to show that the subjective evaluation system upon which NSA relied resulted in a slower promotion rate for black employees at Grade 12 than for white employees at Grade 12 (*id.* at 32a-35a); among other things, he introduced evidence to the effect that, between 1980 and 1982, the NSA promoted nine white employees whose qualifications were allegedly inferior to his (*id.* at 36a-45a).[2] In response, the NSA

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[1] Petitioner expressly abandoned any claim based on a disparate impact theory prior to trial (Pet. App. 11a).

[2] Concomitantly, petitioner purported to show, through the testimony of an expert witness, that between 1979 and 1983, the agency-wide ratio of promotions to eligibility among black Grade 12 employees was only 59% that of whites (II C.A. App. 32). The same

presented evidence purporting to show that, during the relevant period, 63 employees in the unit in which petitioner worked—the "M" organization—became eligible for promotion to Grade 13, that 55 of these persons (including the other four black employees in the group) were promoted ahead of petitioner, and that the median "time in grade" for all those promoted was the same as the median "time in grade" for the five black employees in the unit (*id.* at 47a-48a; I C.A. App. 80, 91, 96-98); in addition, the NSA presented testimony of various supervisors and managers to the effect that there were a limited number of promotions available and that all employees promoted ahead of petitioner had superior qualifications or evaluations (Pet. App. 45a-46a, 49a-54a).

After reviewing all of the testimony and evidence, the district court entered judgment in favor of respondents (Pet. App. 55a). It rejected reliance on petitioner's graduate and law degrees, noting that petitioner's "work was not in the critical skills area" and that "the law degree was not a requirement for [petitioner's] work" (*id.* at 45a). The court further found that "plaintiff was not selected for promotion to Grade 13 until April 1983 because the similarly situated people in the M organization, who were promoted to Grade 13 from October 1975 to April 1983, were properly judged to be better qualified for promotion than the plaintiff" (*id.* at 54a). Finally, it found that "there was no causal nexus between the plaintiff's race and the fact that although he was eligible, he was not promoted to Grade 13 until April 1983" (*ibid.*).

3. In a brief per curiam opinion, the court of appeals affirmed the judgment of the district court (Pet. App.

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expert testified that there was a substantial disparity (from 1975 to 1983) between the proportion of black Grade 12's rated "outstanding" and the proportion of white Grade 12's rated "outstanding" (II C.A. App. 27).

1a-5a). It "review[ed] * * * the entire record" and found that the district court's "findings of fact were not clearly erroneous" (*id.* at 4a). Nor did it find "any error of law in connection with the legal standards applied by [the district court]" (*ibid.*).

4. The decision below is correct. It does not conflict with any decision of this Court or any other court of appeals. Accordingly, review by this Court is not warranted.

a. Petitioner first alleges (Pet. 10-19), contrary to the decisions of the courts below, that what he calls respondents' "vague and arbitrary two-track promotion system" unlawfully discriminated against black employees such as himself. But petitioner's suggestion does not merit review by this Court. To the extent that petitioner is suggesting that the courts below should have held that respondents' subjective evaluation system had an unvalidated disparate impact on black employees, he is raising a claim that he expressly abandoned in the district court (Pet. App. 11a). He cannot raise that claim for the first time in this Court. See *Youakim* v. *Miller*, 425 U.S. 231, 234-236 (1976) (per curiam). And to the extent that petitioner is suggesting (Pet. 13-14) that the courts below should have held that this subjective evaluation system is a "camouflage" for a pattern-and-practice of "irrational and arbitrary" disparate treatment, he is raising an entirely fact-bound argument that was rejected by both courts below; accordingly, the argument does not merit certiorari review. Accord *Goodman* v. *Lukens Steel Co.*, No. 85-1626 (June 19, 1987), slip op. 7-8. In any event, the record overwhelming establishes that NSA's promotion system did not have a disparate effect on black workers and that the people who were promoted ahead of petitioner were objectively more qualified than he. Thus, however petitioner's suggestion is viewed, it is clearly wrong.

b. Petitioner also errs in suggesting (Pet. 19-23) that the district court's decision to discount the significance of his graduate and law degrees warrants review by this Court. The district court did not hold that graduate and law degrees are inherently insignificant or unimportant job qualifications. It merely held that they were not manifestly related to the requirements of petitioner's work (Pet. App. 45a). This factbound conclusion, affirmed by the court below, raises no legal question warranting review by this Court.

It is therefore respectfully submitted that the petition for a writ of certiorari should be denied.

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OCTOBER 1987

U.S. GOVERNMENT PRINTING OFFICE: 1987 – 181-483/60050